

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 1 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and sd/-  
MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
1 to 5 No.

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COMMISSIONER OF INCOME TAX

Versus

I G BELLINE

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Appearance:

MR.MIHIR JOSHI with MR MANISH R BHATT for Petitioner  
MR.MANISH J.SHAH for JP SHAH for Respondent

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CORAM : MR.JUSTICE C.K.THAKKER and  
MR.JUSTICE M.C.PATEL

Date of decision: 17/06/98

ORAL JUDGEMENT(Per C.K.Thakkar,J.):

The following two questions are referred for our consideration:-

- 1."Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in

coming to the conclusion that the remittance of Rs.1,47,750/- was not liable to be included in the income of the assessee under section 9 or under section 16 of the Income-tax Act,1961?"

2."Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in not treating the housing and motor car expenses of the assessee as perquisites?"

Mr.Shah, learned Advocate for the assessee, submitted that so far as the first question is concerned, it is answered in favour of the assessee by this Court in ALESSANDRO CONSTANTINI v. COMMISSIONER OF INCOME TAX, 226 ITR, 883. It is not disputed that the point is covered by a Division Bench in the above case.

Mr.Joshi, for the revenue, however, submitted that the attention of the Court was not invited to Explanation added to Section 9(1)(d)(ii) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), which was added by the Finance Act, 1983 with effect from 1.4.1979. The said Explanation reads as under:-

"Explanation.- For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India."

Mr.Joshi submitted that the Explanation specifically stated that "for the removal of doubts", it was declared that income of the nature referred to in that clause payable for service rendered in India should be regarded as income earned in India. Inasmuch as the Explanation was "clarificatory" in nature and for the purpose of "removal of doubts" it was added, it would have retrospective effect and though in the instant case, the Court is concerned with the assessment year 1977-78, the Explanation will have to be read even in respect of that assessment year. If it is so, the Reference must be decided in affirmative, i.e. in favour of revenue and against assessee.

Almost in similar circumstances, the question came up for consideration before the High Court of Kerala in COMMISSIONER OF INCOME-TAX v. I.S.R.PATTON, 193 I.T.R. 49. There also, it was contended on behalf of the revenue that as the Explanation was clarificatory, it should be given effect even prior to date on which it was inserted with effect from April 1, 1979.The said argument

was, however, negatived by the High Court of Kerala, observing that the Explanation cannot be said to be mere declaratory and it cannot apply to a period anterior to April 1, 1979.

This Court in Commissioner of Income Tax, Gujarat v. S.G.Pgnatale, 124 ITR 391 held before insertion of Explanation by the Finance Act, 1983 that the words "earned in India" in Section 9(1)(d)(ii) of the Act must mean "arising or accruing in India". If the income does not accrue in India, clause (ii) would not apply even though such income might have been derived from "services rendered in India".

Then the Explanation came to be added by the Finance Act, 1983 which was given effect from April 1, 1979. Dealing with the decision of this Court in S.G.Pgnatale and the Explanation, the High Court of Kerala observed:

"It is evident that the Gujarat High Court did not accept the views of the text book writers regarding the scope of section 9(1)(ii) of the Act as it stood, before the addition of the Explanation. It was, perhaps, due to the above controversy regarding the scope of section 9(1)(ii) of the Act that the Legislature intervened and added the Explanation to section 9(1)(ii) of the Act, with effect from April 1, 1979. In the circumstances, the purpose behind the addition of the Explanation was only to clarify and settle the controversy. The Explanation was to have effect only from April 1, 1979. We are, therefore, of the view that the Explanation to section 9(1)(ii) of the Act cannot be considered to be declaratory nor can it apply to any period anterior to April 1, 1979."

(Emphasis supplied)

We are in agreement with the view taken by the High Court of Kerala.

In view of the above legal position and the decision of Kerala High Court, question No.1 must be decided in the negative, i.e. against the revenue and in favour of assessee.

So far as the second question is concerned, it is covered by the decision in S.G.PGNATALE (supra), reiterated in ITR No.102 of 1988, referred to in

ALESSANDRO CONSTANTINI (supra). The second question, therefore, must be decided in the negative, i.e. against the revenue and in favour of assessee.

For the foregoing reasons, both questions Nos. 1 and 2 are answered in the negative, i.e. against the revenue and in favour of assessee. The Reference is accordingly disposed of. In the facts and circumstances of the case, no order as to costs.

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